

***United States Court of Appeals
for the Second Circuit***



APPELLEE'S BRIEF

74-1581

To be argued by
GEOFFRY R. HANDLER

IN THE
United States Court of Appeals
For the Second Circuit

ROBERT R. FELTON, *et ano.*,

Plaintiffs-Appellants,
against

WALSTON AND CO., INC., *et al.*,

Defendants-Appellees.



BRIEF OF DEFENDANTS-APPELLEES STICHTING
EXCERPTA MEDICA (EXCERPTA MEDICA FOUN-
DATION), MEDISCHE REFERANTAN (EXCERPTA
MEDICA) n.v., INFONET (EXCERPTA MEDICA-
RESCONA) n.v., AND ELTRAC (INFONET) n.v.

SHEA GOULD CLIMENKO & KRAMER
Attorneys for Defendants-Appellees
Stichting Excerpta Medica (Excerpta
Medica Foundation). Medische Ref-
erantan (Excerpta Medica) n.v., Info-
net (Excerpta Medica-Rescona) n.v.,
and Eltrac (Infonet) n.v.

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ISSUES PRESENTED FOR REVIEW

Did the District Court, after plaintiffs had had the benefit of extensive discovery, properly dismiss the third amended complaint for failure to plead fraud with the particularity required by Rule 9 of the Federal Rules of Civil Procedure?

Where the District Court dismissed the first amended complaint and the proposed second amended complaint because, inter alia, neither pleaded fraud with sufficient particularity and where leave was granted to plaintiffs to serve a final amended complaint, was the District Court's dismissal without leave to replead within its discretion and in the interests of justice?

Where the District Court found that plaintiffs would not fairly and adequately protect the interests of a class, and that it was not apparent that there were questions of law and fact common to the class, was the denial of plaintiffs' motion for class action certification within the discretion of the District Court?

FEDERAL RULE INVOLVED

Rule 9—Pleading Special Matters

* * *

(b) Fraud, Mistake, Condition of the Mind. In all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity. Malice, intent, knowledge, and other condition of mind of a person may be averred generally.

STATEMENT OF THE CASE
AND ARGUMENT

We are in full accord with the answering brief submitted on behalf of the Marine Midland defendants and incorporate by reference the Statement of the Case and Argument contained therein. The authorities discussed therein apply with equal, if not stronger, force to allegations in the third amended complaint concerning defendants-appellees Stichting Excerpta Medica (Excerpta Medica Foundation), Medische Referantan (Excerpta Medica) n.v., Infonet (Excerpta Medica-Rescona) n.v., and Eltrac (Infonet) n.v. (the "Dutch companies").

The third amended complaint alleges many transactions between defendant 3 I Co./Information Interscience, Inc. ("3 I Co.") and the other defendants herein. Only one of those transactions, the sale of a data bank, arguably involved any of the Dutch companies. That sale was made to 3 I Co. by the onetime subsidiaries of defendant Stichting Excerpta Medica.

Plaintiffs attempt to parlay that single allegation

regarding the data bank sale into a securities law violation by surrounding it with conclusory allegations of conspiracy and fraud. Plaintiffs, however, have entirely failed (1) to allege even one false or misleading representation made by the Dutch companies, (2) to support their broadside allegations of conspiracy and fraud with specific facts, or (3) to identify the sources for the "information and belief" on which they base their allegations made against the Dutch companies.

After alleging the data bank sale in paragraph 23 of the third amended complaint (494a*), the next reference to the Dutch companies appears in paragraph 28(a) (496a), where the following is alleged:

"Defendants 3 I Co. and Brodsky conspired and schemed with defendants Excerpta Medica, Warren and Von Eugen to materially enhance the financial statements of 3 I Co. by the use of a worthless data bank license deceptively stated as an asset equivalent to 62% of the entire 3 I Co. balance sheet assets. These defendants conspired and schemed to deceptively utilize inflated restricted stock, overstated as \$1,000,000 as the cost of this license. Although defendants' agreements provided for repurchase of this stock by 3 I Co. at stated prices and stated dates, no repurchases were ever made and defendants Excerpta Medica and Von Eugen never sued to require repurchasing. The real intent of these defendants was evidenced in the 1972 3 I Co. 10 K report filed with the Securities and Exchange Commission wherein this stock was characterized as terminated stock rights."

* Numbers in parentheses are references to pages of the appendix.

Apart from the above-described allegations, and the patently over-generalized assertion of conspiracy and fraud in paragraph 29 of the third amended complaint (498a), plaintiffs make no allegations with respect to the Dutch companies.

Accordingly, shorn of its broadside allegations of fraud and conspiracy, the amended complaint presents but one neutral allegation against the Dutch companies -- that they sold a data bank to 3 I Co., which data bank, according to plaintiffs, was worthless. Clearly, such an allegation is too thin a reed to support a securities law violation. Were the law otherwise, those with a litigious bent could compel companies to come from distant locations to the defense of protracted litigation merely by flanking allegations regarding some bona fide business transaction with general and unsupportable allegations of conspiracy and fraud.

The specificity requirement of Rule 9(b) was formulated to stave off just such strike suits and, as a result, was properly invoked by the District Court in dismissing the amended complaint herein as to the Dutch companies. Segal v. Gordon, 467 F. 2d 602, 607 (2d Cir. 1972).

CONCLUSION

The decision of the District Court should be affirmed
in all respects.

Respectfully submitted,

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STATE OF NEW YORK)
: ss.:
COUNTY OF NEW YORK)

GILDA STEIN, being duly sworn, deposes and says:
that deponent is in the employ of SHEA GOULD CLIMENKO & KRAMER,
attorneys for Defendants Medische Referatan (Excerpta Medica)
N.V., Infonet (Excerpta Medica - Rescona) N.V. and Eltrac
(Infonet) N.V., herein, is over 18 years of age, is not a party
to this action and resides at 16-70 Bell Boulevard, Bayside, N.Y.
On the 25th day of September, 1974, deponent served the within
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Gilda Stein
GILDA STEIN

Sworn to before me this

25th day of September, 1974.

25th day of September, 1974.

Princ...
PRINCIPAL HUNTERSON
Principle Hunterson
Qualifies in New York County
Commission Expires March 30, 1977